NO. 77-1033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

* * *

DOLPH BRISCOE, ET AL, Appellants

V.

FRANK ESCALANTE, ET AL, Appellees

* * *

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

* * *

MOTION TO DISMISS AND IN THE ALTERNATIVE TO AFFIRM

* * *

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January 31, 1978

I N D E X

TABLE OF AUTHORITIES

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* * *

Now come appellees Frank Escalante, et al, plaintiffs-intervenors below and Rosa Maria Gonzalez Moreno, et al, plaintiffs below and move that this appeal be dismissed or in the alternative that the decision below be affirmed.

STATEMENT OF THE CASE

Following this Court's affirming the decision of the District Court to apportion Dallas and Bexar Counties' multi-member districts and remanding this case for further proceedings (White v. Regester, 412 U.S. 755 [1973]), plaintiffs-intervenors below and appellees herein filed a separate suit and motion seeking consolidation and to intervene in this case challenging the constitutionality of multi-member District 32 (Tarrant County). Following a hearing on December 3, 4, and 5, 1973, the same three judges who heard Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) announced on December 21, 1973, that among other districts, multi-member Legislative District 32 in Tarrant County denied plaintiffs and plaintiffs-intervenors below equal access to the political process and on January 28, 1974, after further hearing ordered the plan proposed by plaintiffs-intervenors below be used for the 1974 elections and thereafter.

The State applied to and was granted a stay by Mr. Justice Powell on February 2, 1974.

The defendants below duly perfected their appeal to this Court. Oral argument was heard on February 19, 1975.

Following oral argument, the Texas Legislature adopted House Bill 1097, which undertook to abolish all multi-member legislative districts in Texas and upon passage of such legislation being called to this Court's attention, this Court on June 30, 1975, remanded

this case to the District Court:

> "for reconsideration in light of the recent Texas reapportionment legislation and for dismissal if the case is or becomes moot." White v. Regester, 422 U.S. 935 (1975).

Following the 1975 remand, the State of Texas came under the Voting Rights Act (42 USC 1973 as amended, 1975) and after submission of H.B. 1097 to the Department of Justice pursuant to Section 5 thereof, the Department of Justice on January 23, 1976, made its objection to that portion of H.B. 1097 which applied to State Representative District 32 (Tarrant County).

Following a hearing on February 9, 1976, the District Court on February 19, 1976, citing "exigencies of time" adopted the plan of defendants below and appellants herein as a temporary plan "for use in the 1976 elections" and retained jurisdiction for further hearing after the 1976 elections if warranted.

The plan adopted by the District Court as a temporary plan contained population deviation among the nine districts of 7.7% with over half containing population deviations in excess of 2% from absolute population equality. Due to hasty outer boundary changes necessitated by adoption of H.B. 1097, the plan of plaintiffs-intervenors below contained one district with a population deviation of 2% while the other eight districts remained within 1% of absolute population equality.

Plaintiffs-intervenors below gave notice of appeal from the 1976 order and filed an application for stay upon the premise that the 7.7% deviation in the court's temporary plan coupled with over half the districts exceeding 2% deviation from absolute population equality was impermissible as a court-ordered plan as it conflicted with this Court's supervisory guidelines announced in Chapman v. Meier, 420 U.S. 1 (1975). Mr. Justice Powell referred the application for stay to the full Court and on March 1, 1976, this Court denied relief.

Following the filing of several motions by the plaintiffs-intervenors below, the District Court scheduled a hearing on July 12, 1977, which was continued at the request of defendants below and appellants herein. On September 7 and 8, 1977, the District Court heard additional evidence. At that time, plaintiffs and plaintiffs-intervenors below tendered to the Court as a proposed permanent plan the one which was adopted by the District Court in 1974 modified only to conform to outer boundary changes occasioned by the passage of H.B. 1097 and to more closely conform to standards for a court-ordered reapportionment plan announced by this Court in Chapman, supra, (after the plan was submitted to the District Court in 1974) and reiterated in Conner v. Finch, 431 U.S. 407 (1977). With these modifications, the plan of plaintiffs-intervenors below produced a total deviation among the districts of 1.69% with only one district exceeding .6% from absolute population equality.

On October 31, 1977, citing constitutional principles announced in Reynolds v. Sims, 377 U.S. 533 (1964), and the District Court's "exercise of equitable discretion", the District Court adopted as its permanent plan the one proposed by plaintiffs and plaintiffs-intervenors below and appellees herein. On November 10, 1977, the District Court entered its formal order adopting the plan proposed by plaintiffs and plaintiffs-intervenors below as the permanent plan for District 32. The defendants below gave notice of appeal on November 20, 1977, and on the 21st day of November, 1977, presented an application for stay to Mr. Justice Powell which was by him referred to the full Court and granted on December 5, 1977.

ARGUMENT

THE APPEAL WAS NOT TIMELY DOCKETED AND SHOULD BE DISMISSED.

Appellants in filing their application for stay stated at page 6 thereof:

> "Notice of Appeal
>
> Petitioners on November 20, 1977, filed their notice of appeal with the United States District Clerk for the Western District of Texas. The notice is attached to this application as Appendix E."

Following the filing of their notice of appeal, appellants "on this the 20th day of November, 1977," placed a true and correct copy of the application for stay in the United States mail to the attorney for appellees as certified on page 33 of

appellants' application by the attorney for appellants.

Appellants did not docket the case in the manner set forth in Rule 13 of this Court within the time prescribed therein. This case was docketed on January 20, 1978, more than 60 days after notice of appeal was filed with the District Court. Inasmuch as appellants have failed to docket this case within the time prescribed by Rule 13, the Court should grant this Motion to Dismiss the appeal herein. Shapiro v. Doe, 396 U.S. 488 reh den 397 U.S. 970 (1970).

DOES THE PLAN ADOPTED BY THE DISTRICT COURT COMPLY WITH THE COMMON LAW OF VOTING RIGHTS REMEDIES AND SUPERVISORY GUIDELINES OF THIS COURT?

In the alternative, the decision of the District Court is correct and should be affirmed. Even before Chapman v. Meier, supra, appellees in their proposed plan sought to achieve a constitutionally sufficient plan to alleviate the deficiencies of multi-member District 32 without transgressing upon the well-established constitutional principle announced in Reynolds v. Sims, supra. In their 1974 submission, the total deviation among the districts proposed by appellees was 1.3%. In 1976 and 1977, charged with guidelines established by this Court in Chapman, appellees modified their plan so as to more closely conform to the standards established by this Court for court-ordered plans in their submission of a proposal to the District Court for its adoption as a plan designed to rectify the constitutional deficiencies of multi-member District 32 while

also conforming to the standards of Reynolds and Chapman.

By contrast, more than a year after Chapman, in February of 1976 and again in 1977, appellants sought adoption by the District Court of a plan which contained a 7.7% deviation unsupported by the existence of "historically significant state policy or unique features" necessitating departure from the goal of population equality (H.B. 1097 had less than 6.5% deviation among the nine districts of District 32) and one which neither the appellants nor the Court could "articulate clearly the relationship between the variance and any such state policy furthered." (Chapman v. Meier, supra) The District Court in examining alleged state policies concluded that while the maintenance of existing member-constituent relationships is a justifiable state policy and that it is well served in the 1976 plan, the District Court was unable to conclude as required by Chapman a relationship between the variance and that state policy.[1]

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[1]While no incumbents were paired under appellants' plan, only one pair presently exists among the incumbent representatives in appellees' plan inasmuch as two representatives paired under appellees' plan have elected not to seek re-election. The single pair presently existing has resulted from a change of residence of each of the paired representatives since the plan was originally presented in 1974.

Citing "exigencies of time" and over the vigorous objections of appellees which led to an application to this Court for relief, the District Court in 1976 stated that

> "The troublesome question for another day is whether Chapman significantly modified the Mahan standard in relation to court-ordered plans."

When the District Court in 1977 reconvened to adopt permanent relief it assumed its responsibility of tackling this "troublesome question". In the interim, it received additional direction from this Court in its opinions in East Carroll Parish School Board v. Marshall, 424 U.S. 636, and Connor v. Finch, supra, as to the importance and priority of the guidelines so clearly established in Chapman. Although the District Court in adopting a permanent plan turned its decision on "equitable discretion", the permanent plan adopted conforms in all respects to the Supreme Court's guidelines and the District Court properly used these guidelines rather than obscure suggestions of possibly conflicting state policy and political considerations.

The District Court in its conclusion said:

> "Our conclusion today is that the present scheme of districting in Tarrant County produces greater population disparities than necessary to effectuate any coherent and legitimate state policy. We

> accordingly adopt that plan which is, if at all, only marginally less effective in implementing identifiable state interests, and which comes significantly closer to achieving the goal of equal apportionment. This result we believe to be obligatory, both as a matter of constitutional principle, and as the product of the exercise of our equitable discretion."

Although numerous inquiries were made of appellants' witnesses what "important and significant state considerations" rationally mandated departure from the Chapman standards and the relationship between those considerations making the deviation necessary, no "historically significant state policy or unique features" were ever established nor are any "historically significant state policy or unique features" mentioned in appellants' Jurisdictional Statement, much less a showing that the deviation in appellants' plan is necessary to preserve such non-existent state policy.

District courts and litigants who tender reapportionment plans for consideration by districts courts are and should be required to conform such proposals to previously established guidelines enunciated by this Court in pursuance to its supervisory authority over district courts. Appellees herein have conscientiously undertaken to comply with the guidelines of Chapman while appellants ignored these guidelines and rather than reduce the under 6.5% deviation in H.B. 1097 as it related to District 32, chose

to increase that deviation more than 1% without in any manner articulating the necessity even for 6.5% as contained in H.B. 1097, much less the 7.7% in the plan which they say the District Court is obligated to adopt.

Appellants rely upon White v. Weiser, 412 U.S. 783 (1973) and attempt to establish state "goals" as requiring the District Court to accept a plan which is inconsistent with the above mentioned guidelines of Chapman. Appellants failed even to establish discernable state goals. There was no evidence of a state policy or goal claimed by appellants of favoring the representative-constituent relationship for State Legislative seats, only the preference of 8/9ths of the State Representatives from District 32 who drafted the appellants' plan. Their preference is understandable. Mr. Justice White for the Court accurately reflected in White v. Weiser, supra:

> "Of course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge. The District Court should not, in the name of state policy, refrain from providing remedies fully adequate to redress constitutional violations which have been adjudicated and must be rectified."

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN ADOPTING THE PLAN OF APPELLEES RATHER THAN THAT OF THE APPELLANTS?

In examining appellants' contention that the District Court abused its discretion, it is necessary for this Court to consider factual claims of appellants. This Court has consistently held, and appropriately so, that an appellate court must determine that fact findings of the district court are clearly erroneous in order to support reversal.

As Mr. Justice White, speaking for the Court in Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, said:

> "The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' [Citations omitted]."

Leaving fact finding to the district court is particularly appropriate when reversal is urged on the basis of "abuse of discretion". There are numerous

factual claims in the Jurisdictional Statement which are untrue or at best have only limited evidence in support thereof.

There is no suggestion in the Jurisdictional Statement that state policy or unique features necessitated the deviation contained in appellants' plan.

Factual claims at pages 15 and 25 of the Jurisdictional Statement and inferences therefrom suggest substantial impact upon the Fort Worth Independent School District and the City of Fort Worth. There is no evidence in the record as to the effect of the court-ordered plan on recently enacted legislation purporting to establish single member districts for the Fort Worth Independent School District. That legislation (Chapter 23, Texas Education Code, Article 23.023, as amended 1977) has been objected to by the Justice Department and is of no force and effect.

Factual claims at pages 9 and 15 of the Jurisdictional Statement (referring to the Appendix at page 71, et seq.) inferring impact on Fort Worth city council districts likewise are untrue and are not supported by the evidence. It is understandable that the District Court did not discuss the impact of the 1977 plan on the city council districts of Fort Worth when the author of the "Review of Possible Effects" (page 71, Appendix, Jurisdictional Statement), Darrell Noe, a witness for appellants, on cross-examination related that these effects were "not necessarily probable and certain outcomes" and that "I en-

titled my review 'possible effects'" (page 242, Trial Record). Mr. Noe further testified:

> "Q (By Gladden) All right. So this impact on these 19,830 people would be impacted only if the county chose to draw precinct lines which conflicted with the present City Council district lines?
>
> A That's correct.
>
> * * *
>
> Q So really we are talking about three precincts --
>
> A Major changes.
>
> Q --that would require significant numbers to be changed and they would be being changed from an over-populated district to an under-populated district?
>
> A Yes." (page 220, Trial Record)

In addition, Mr. Noe has since repudiated the alleged impact stating that his testimony was based "only on hypothesis" and that the appellees' plan now will require only minor modifications of the Fort Worth City Council Districts. This repudiation is shown as Appendix A hereto.

Another allegation of concern is the suggestion of adverse minority impact, particularly as to State Representative Leonard Briscoe and his district (page 19, Jurisdictional Statement). State

Representative Briscoe, a Black and a former city councilman of the City of Fort Worth, is the only member of an ethnic minority ever to be elected a State Representative from Tarrant County and credits this litigation for his presence in the Texas House of Representatives. State Representative Briscoe testified in favor of the permanent plan adopted by the District Court both in 1976 before he was elected to the legislature and again at the September, 1977 hearing.[2]

Factual allegations of "...approval of all the democratically elected City Council and other local governmental bodies within the County of Tarrant" (page 9, Jurisdictional Statement) and "... the plan unanimously endorsed by the pertinent political bodies" (page 11, Jurisdictional Statement) are not in any wise supported by the evidence. Neither the resolution of the Tarrant County Mayors Council (page 70, Appendix, Jurisdictional Statement) nor the resolution of the Arlington City Council (page 68, Appendix, Jurisdictional

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[2]State Representative Briscoe's testimony also reflects that the reason no legislative plan was enacted during the 1977 special session was because the Tarrant County delegation could not agree upon a plan and for this reason the Governor refused to expand his "call" to include legislative redistricting in the special session.

Statement) were unanimous.[3]

More importantly, the City Council of the City of Fort Worth representing more than 57% of the population situated in District 32 took no action for or against either plan. Adoption of resolutions in support of appellants' plan by the House of Representatives (page 65, Appendix, Jurisdictional Statement) and the Texas Senate (page 61, Appendix, Jurisdictional Statement) were not unanimous.[4]

Other factual claims, such as administrative inconvenience and expense, have at best limited evidence in support thereof with the greater weight being against these claims.

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[3]The record is silent as to the Arlington City Council vote although Dr. Sam Hamlett, a member of the Arlington City Council and head of the Political Science Department of the University of Texas at Arlington, cast his dissenting vote on that resolution.

[4]Although voting in the House of Representatives was by voice vote, State Representative Leonard Briscoe as well as many other minority members (both black and Mexican-American) recorded their vote against the resolution.

The above instances of evidentiary disputes are by no means inclusive but they demonstrate clearly why this Court has traditionally and wisely left "fact finding" to the district court and appropriately resolved that the district court made findings of fact in support of its judgment. It is respectfully suggested that there is no showing that the District Court abused its discretion.

CONCLUSION

Inasmuch as the appellants failed to docket this case within the time required by Rule 13, this appeal should be dismissed or in the alternative since the judgment of the District Court conforms to all guidelines established by this Court for a court-ordered apportionment plan and is one consistent with powers of the District Court in its exercise of equitable discretion in forming remedial relief it should in all things be affirmed.

The appeal of appellants should be dismissed or in the alternative the judgment of the District Court should be affirmed.

Respectfully Submitted,

VILMA S. MARTINEZ
JOAQUIN G. AVILA
LINDA HANTEN
MORRIS J. BALLER
DON GLADDEN

By: _____
Don Gladden

14d FORT WORTH STAR-TELEGRAM ■ THURSDAY MORNING, NOVEMBER 24, 1977

Official says deposition based on hypothesis

By ROBERT MAHONEY
Star-Telegram City Hall Writer

Fort Worth Assistant Planning Director Darrell Noe, on whose deposition Texas Attorney General John Hill relied in his appeal to the U.S. Supreme Court on a federal court decision redistricting Tarrant County's legislative districts, said Wednesday his deposition was based "only on hypothesis."

Noe said "conditions have changed" since he filed that deposition in August because he said the city and county have worked together "to minimize the impact" on the city's single-member district boundary lines created by a redistricting plan approved by attorney Don Gladden and the federal court.

"We (the city) have no axe to grind either in favor of or in opposition to it (the Gladden plan)," Noe said. "The only reason why I filed a deposition was to protect the integrity of the single-member district plan in Fort Worth and to express the city's concerns on what impact it could have had on us."

In his deposition, Noe said the Gladden plan "could have a subtantial impact on the composition, population total and racial integrity" of the city's existing single-member districts.

He said, however, that the key word in that statement is "could" and he said the impact of the Gladden plan now will require only minor modifications of the council district lines.

• • •

SOME 14 VOTING precincts would be affected by the modification, but Noe said most of those precincts lie on the periphery of the city.

Although nearly 20,000 persons could be affected by the precinct changes, Noe said only 3,000 persons would find themselves in a different council district, if the Supreme Court upholds the federal court decision.

In a related development Wednesday, Gladden filed the second of two responses with U.S. Supreme Court Associate Justice Lewis Powell asking him not to grant a stay of the lower court's ruling that would allow his redistricting plan to become effective.

Hill is seeking a stay of the court's ruling because he said it would cause "irreparable harm" for the city and the school district.

The city and the school district have single-member district plans based on voting precinct lines, while Gladden's plan would base such districting on census tracts exclusively.

• • •

IN THE BRIEF, Gladden included a Tuesday morning Star-Telegram story quoting Noe's statement that the affect of the Gladden plan on the city's single-member districts would be minimal.

The effect would not be of the magnitude quoted in Hill's request and it should not be used in making a decision on whether the lower court's decision should stand, Gladden said.

In the previous story, Noe said that two council district lines would have to be redrawn before the next council election in April 1979.

Pcts. 77 and 97 "may have to be pulled from" District 9 on the Near South Side into District 6 on the Far South Side, he said.

About 2,000 people would be affected by the shift from one district to the other, Noe said.

• • •

DISTRICT 9 is represented by Councilwoman Shirley Johnson and District 6 is represented by Councilman Woodie Woods.

Noe also said Pct. 119 in the Riverside area could be affected in the redistricting plan with the possibility that the precinct would be split between District 4 on the East Side and District 8 on the Central-East Side.

About 1,000 persons would be affected in a potential precinct split there, he said.

District 4 is represented by Councilman Jeff Davis and District 8 by Councilman Jim Bagsby.

Noe said the other changes would affect council districts that do not overlap, but are situated on the city's periphery.